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No. 03-861

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT C. BLACK,

Petitioner,

v.

DELTA AIR LINES, INC. and AL PEREZ,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether plaintiff's claims that sought to expand the airline's obligations regarding boarding procedures beyond that agreed upon by the parties and beyond the applicable regulations amounted to enforcement or enactment of state law relating to services of an airline and, thus, were preempted by the Airline Deregulation Act of 1978, specifically, 49 U.S.C. § 41713(b)?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, counsel for Respondent Delta Air Lines, Inc. certifies the following:

> Respondent Delta Air Lines, Inc. is a publicly traded company having its principal place of business in Atlanta, Georgia. Respondent Delta Air Lines, Inc. has no parent corporation. No publicly held company owns 10 percent or more of the stock of Delta Air Lines, Inc.

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STATEMENT OF THE CASE

On June 23, 1995, Mr. and Mrs. Robert Black checked in at the Dallas/Fort Worth Airport for Delta flight 661 to Las Vegas. The Blacks were holding two first class tickets on the flight, which Mr. Black had obtained just a few hours earlier from their travel agent. Unfortunately, the travel agent only booked a first class seat for Mr. Black. Mrs. Black's reservation was for a seat in coach, although her ticket coupon indicated first class. Delta could not accommodate Mrs. Black in first class because that section was sold out. Delta, through its gate representative Al Perez, made every reasonable effort to accommodate Mr. and Mrs. Black, even though Mrs. Black did not have a first class reservation. Delta asked each of the first class passengers if one of them might sit in the main cabin or take a later flight, so that the Blacks could travel together in first class. Although Delta offered a free domestic ticket to any volunteer, no one accepted the offer. Delta offered the Blacks main cabin seats on the flight, with the offer to refund the fare difference between first class and coach (sixty dollars) and give the Blacks two free domestic tickets. Mr. Black refused this offer. As another alternative, Delta offered the Blacks free travel vouchers plus two first class seats on a flight about to leave for Los Angeles, where they could connect to Las Vegas. Mr. Black also refused this offer. Delta then offered the Blacks travel vouchers plus two confirmed first class seats on the next non-stop to Las Vegas. Once again, Mr. Black refused the offer, shouting "We'll see you in court!" Mr. Black and his wife then left the airport, drove to Dallas Love Field, and chartered a private jet to fly them to and from Las Vegas, running a tab of $13,150.50 for the jet rental and the cost to feed and house an air crew in Las Vegas for two days.

Mr. Black then brought this suit, seeking to pass the costs of his luxury jet charter on to his travel agent, and/or Delta, and/or the Delta gate supervisor at the airport.[1] He also sought to recover alleged mental anguish, punitive damages, and attorneys' fees. Mrs. Black did not join in the suit. Mr. Black sued Delta and Al Perez, the supervisor at the airport gate, based on allegations of intentional and negligent misrepresentation. Mr. Black also sued Delta for alleged breach of contract.

ARGUMENT AND REASONS FOR DENYING THE WRIT

I. The Petition Does Not Raise Important and Recurring Questions

Contrary to Black's contention, the issues raised by the present case are neither important nor recurring. Nor did the court below hold, as Black claims, that "the ADA preempts a breach of contract claim against an airline." Petition for Certiorari, at 6. To the contrary, the Texas Supreme Court's opinion is well reasoned and correct under the law. Black conceded in his briefing before the Texas courts that the contract of carriage between himself and Delta incorporated the federal regulations relating to boarding procedures.[2] The opinion correctly noted that

[1] Delta and its employee Perez will be referred to collectively as "Delta."

[2] See Brief in Response to Petitioners' Brief on the Merits at p. 17 (filed with the Texas Supreme Court). Black was indeed correct in that the contract of carriage included the express language of the regulation

(Continued on following page)

those regulations (and Delta's contract of carriage) provide that a ticketed passenger who is offered a seat on the assigned flight in a lower class is entitled to a refund in the amount of the difference in price between the two classes, but is not otherwise eligible to receive compensation for denial of accommodations in the first class cabin. (App. 21)[3]

Thus, as part of the contract of carriage, Black agreed to accept a refund of the price difference as his only compensation for a downgrade in service. Black's decision to reject this express remedy provided by the regulations and the contract of carriage, and to sue Delta instead on alleged state common law claims that he asserts would entitle him to reimbursement of the cost of a chartered private luxury jet and its crew, seeks to expand Delta's duties far beyond the terms of any bargain and, thus, is preempted as a matter of law by the ADA.[4] Delta has been unable to locate any other reported decision dealing with the issue of the rights of a downgraded passenger to compensation beyond the refund expressly provided for in a carrier's contract of carriage and Black has been unable to point to any. Given the unusual facts of this case (a passenger rejecting repeated reasonable attempts by a carrier to accommodate him in ways that went far beyond what was required by the contract of carriage, and opting

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limiting the passenger to a refund of the difference in fare where the passenger has been offered a seat on the aircraft, albeit in coach.

[3] All references to "App." are to the Appendix to Black's Petition for Writ of Certiorari.

[4] Airline Deregulation Act of 1978, 49 U.S.C. § 41713(b).

instead to manufacture significant "damages" by chartering a luxury jet for a weekend getaway to Las Vegas), it is highly unlikely that a similar fact situation will ever arise. The Texas Supreme Court correctly disposed of Black's meritless claims and they do not justify further review by this Court.

II. The Supreme Court of Texas Correctly Concluded That Black's Claims Seek to Expand the Parties' Bargain Based on State Law or Policies External to the Agreement and, Thus, That His Claims Were Preempted Under *American Airlines, Inc. v. Wolens*

Black's claims have always sought to blur the difference between a denial of boarding and a downgrade in seating class. Black has always contended that Delta denied his wife boarding and, therefore, the applicable regulations permitted him to refuse any offer by Delta and sue for a different remedy in state court. As the Texas Supreme Court correctly noted, this contention is incorrect on its face because the regulations do not require the payment of any denied boarding compensation if the passenger is accommodated on a flight, even if the accommodation occurs in a lower class of service. Specifically, 14 C.F.R. § 250.6(c), provides:

> A passenger denied boarding involuntarily from an oversold flight shall not be eligible for denied boarding compensation if: . . .
>
> 3. The passenger is offered accommodations or is seated in a section of the aircraft other than that specified on the ticket at no extra charge, except that a passenger seated in a section for which a lower fare is charged

> shall be entitled to an appropriate refund. . . .

The Texas Supreme Court properly concluded Delta had not denied Mrs. Black boarding because it offered her another seat on the aircraft along with the appropriate refund. (App. 21) Moreover, the court properly found that the regulation was made part of the contract of carriage. (App. 20)

In this case, as noted above, the applicable regulation and Delta's contract of carriage expressly provide for a remedy when Delta cannot accommodate a confirmed reservation in the first class cabin – transportation to the same destination in the coach cabin, and refund of the fare difference. Thus, the court properly concluded that the agreement between the parties did not allow Black to reject this contractual remedy, splurge on a private luxury jet for the weekend, and expect Delta to pay the tab. (App 22-23) Any court that permitted Black to recover on such claims would necessarily be enlarging or enhancing the agreement based upon state law or policy external to that agreement, which would run afoul of ADA preemption. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219, 233 (1995). Indeed, that is precisely what Black urged the Texas courts to do. He urged the courts to permit his claims as a matter of public policy to discourage airlines from downgrading passengers from first class to coach. Brief in Response to Petitioners' Brief on the Merits at pp. 10, 23 (filed with the Texas Supreme Court).

Nor does the savings clause in the ADA change the result, as the Texas Supreme Court correctly stated in footnote 2 of its opinion, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). (App. 10, n. 2) The

passage Black quotes from *Wolens* regarding the savings clause does not hold that the savings clause in any way supercedes the preemption clause. Indeed, Black only quotes part of the passage from *Wolens*, leaving out the following sentence: "The distinction between what the State dictates and what the airline itself undertakes confines the courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *Wolens*, 513 U.S. at 233. Thus, this Court made it perfectly clear in *Wolens* that the preemption clause is not superceded by the savings clause.

Black urged the Texas Supreme Court to read *Wolens* as essentially holding that no breach of contract action can ever be preempted under the ADA. That, of course, was not this Court's holding in that case. Rather, as the Texas Supreme Court properly recognized, a breach of contract claim that seeks to extend the parties' agreement beyond the bargain made between them can amount to state action and, thus, is preempted if it relates to price, route, or service of an airline. (App. 13) Because that is exactly what Black's alleged claim for breach of contract seeks to do, the Texas Supreme Court correctly held that it was subject to ADA preemption.

III. The Texas Supreme Court Properly Concluded That Black's Common Law Fraud and Misrepresentation Claims Were Preempted as Well

Black's fraud and misrepresentation claims also seek to circumvent the regulations and the terms of Delta's contract of carriage based upon alleged state law or policy to the contrary. The Texas Supreme Court correctly noted

that the claims were comparable to state consumer fraud claims and, thus, are also preempted by the ADA. (App. 26) See *Morales*, 504 U.S at 383. Again, Black premised his arguments in the state courts on public policy grounds. See, e.g., Brief in Response to Petitioners' Brief on the Merits at pp. 10, 23 (filed with the Texas Supreme Court). The Texas Supreme Court correctly held that Black's fraud and misrepresentation claims relate to Delta's services and would amount to enactment or enforcement of state law and, thus, are preempted by the ADA.

IV. The Texas Supreme Court's Interpretation of "Services" is Consistent with the Interpretation of that Term by all of the Circuit Courts of Appeals

Black's contention that the Texas Supreme Court somehow usurped this Court's authority in deciding an issue that has split the Courts of Appeals ignores the Texas Supreme Court's opinion. The Texas Supreme Court noted the United States Courts of Appeals have fashioned different tests for determining whether a state law action relates to an airline's services. The court noted that the Ninth Circuit narrowly defines services as "the prices, schedules, origins and destinations of the point-to-point transportation of passengers, cargo, or mail." (App. 16, *quoting Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1261 (9th Cir. 1998)) The Texas Supreme Court then noted that other courts, such as the Fifth Circuit, give the term a more expansive interpretation to include "ticketing, boarding procedures, provisions of food and drink, and baggage handling, in addition to the transportation itself." (App. 17, *quoting Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995)) Rather than pick a side, as Black

suggests it did, the Texas Supreme Court held that state law claims that related to seating and boarding procedures relate to services under both tests. (App. 17-18) See *Somes v. United Airlines, Inc.*, 31 F.Supp.2d 78, 85 (D. Mass. 1999) (noting that boarding constitutes services under both the Ninth Circuit and Fifth Circuit tests). This finding is especially valid given the fact that Black sought to characterize his claim as being one for denied boarding. The boarding of passengers is an integral part of the "point-to-point transportation" of passengers and, thus, qualifies as "services" even under the Ninth Circuit's overly narrow test. Therefore, Black's attempt to paint the case at hand as involving a split among the Courts of Appeals is unpersuasive.

V. The Texas Supreme Court Properly Construed the Federal Regulations and, at Black's Urging, Interpreted the Contract of Carriage as Incorporating Them

In making his argument regarding the effect of the oversales regulations, Black overlooks the fact that he conceded to the courts below that the regulations became part of the contract of carriage. Indeed, he urged the Texas Supreme Court to consider the regulations. Having invited the court to read the contract in this manner, Black cannot now claim that the court erred in so doing.

Moreover, the Texas Supreme Court correctly interpreted and applied the regulations in this case. 14 C.F.R. § 250.6(c) makes clear that a passenger, such as Mrs. Black, who "is offered accommodations . . . in a section of the aircraft other than that specified on the ticket at no extra charge" is not "denied boarding" and is not entitled to any denied boarding compensation. That passenger is

entitled only to a refund of the difference in the fare for the two classes of service. The court below concluded that this remedy was incorporated into the contract of carriage in this case. (App. 20) Therefore, Black's arguments concerning whether denied boarding compensation establish only a minimum standard as a *regulatory* matter is irrelevant. In this case, that remedy forms the basis of the private bargain between the parties. It therefore establishes the only standard that matters in this breach of contract claim.

Black's argument that the court's holding amounts to a forfeiture and robs Black of his remedy is circular in that it presupposes that Black was legally damaged and is entitled to a legal remedy. In reality, the only reason why Black is left holding the bill for his chartered flight is that he chose to ignore the terms of his agreement and the proper application of the regulations. He wrongly perceived that the law had handed him a blank check and he went out and wrote a huge one. The law permitted him a remedy that he rejected – a sixty dollar refund of his first class upgrade. There simply has been no forfeiture for the law to abhor in the case at hand.

Black's argument that Delta is somehow estopped from denying that Mrs. Black was entitled to denied boarding compensation because Delta offered the Blacks flight coupons and free vouchers is specious. Delta was faced with an unreasonably irate passenger who was apparently a frequent traveler on its airline. Delta's offering that passenger a flight coupon in an attempt to placate him is not inconsistent with arguing that Delta did not deny him boarding. The simple truth is that at all times Mrs. Black had a seat available for her on the flight in question. Under the terms of the contract for carriage,

Delta had the right to seat her in coach so long as Delta offered to reimburse her the difference in the fares, which it did. The only person who denied Mrs. Black boarding was her husband, who refused to abide by the terms of the agreement.

Black now attempts to interpret 14 C.F.R. § 250.9(b) as placing Mrs. Black in the category of passenger who has been denied boarding because she, according to Black, was denied a "reserved seat." The regulation, however, does not speak in terms of a specific seat or a class of service. For instance, the regulation cannot be read so as to deem a passenger who had been assigned an aisle seat in a certain row to have been denied boarding simply because the airline changed the seat assignment to the next row or from the aisle to the window. Indeed, it must be remembered that Mrs. Black, unlike her husband, was never assigned a specific seat on the aircraft. Therefore, even under Black's overly literal reading of the regulation, it cannot be said that she was denied a "reserved seat." 14 C.F.R. § 250.6(c), embodied in the contract of carriage, makes clear that downgraded passengers who are offered a refund of the difference in fares are not entitled to denied boarding compensation. The regulations and the terms of Delta's contract of carriage provide that this refund of the fare difference is the only remedy available in Black's case. Therefore, Black's new argument does not show any error on the part of the Texas Supreme Court.

CONCLUSION

For the reasons discussed above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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